BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
MFS Petition Regarding Unbundling of Local Exchange Carrier Common Line Facilities	RM - 8614

OPPOSITION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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April 10, 1995

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Pursuant to Sections 1.4 and 1.405 of the Federal Communication Commission's ("FCC" or "Commission") General Rules of Practice and Procedure, 47 C.F.R. Sections 1.4 and 1.405 (1994), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully files this opposition to the "Petition for Rulemaking" filed by MFS Communications Company, Inc. ("MFS") on March 7, 1995, and noticed by the FCC in its March 10, 1995 Report No. 2061.

In support of its opposition, NARUC states as follows:

I. INTEREST OF NARUC

NARUC is a quasi-governmental nonprofit organization founded in 1889. NARUC includes within its membership those governmental bodies of the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, which engage in the regulation of carriers and utilities.

NARUC's mission is to improve the quality and effectiveness of public utility regulation in America. More specifically, NARUC is composed of the State officials charged with the duty of regulating the telecommunications common carriers within their respective borders. As such, they have the obligation to assure the establishment of such telecommunications services and facilities as may be required by the public convenience and necessity, and the furnishing of service at rates that are just and reasonable. As discussed below, MFS's petition, if granted, will clearly impact upon this obligation.

II. BACKGROUND

On March 10, 1995, MFS filed a petition asking the FCC to take major actions directly affecting States that have authorized local exchange competition. The petition generally asks the FCC to adopt rules promptly requiring the Tier 1 LECs to provide the common line element of interstate switched access service (the "local loop") on an unbundled basis, at cost-based rates, to state-certified competing providers of such service. Specifically, MFS asked that each Tier 1 LEC be required (1) to make available unbundled loops in any study area in which the state has authorized local exchange competition, (2) to permit interconnection to such loops via tariffed expanded interconnection arrangements, (3) to comply with uniform minimum technical criteria, and (4) to prohibit LECs from charging more for the interstate component of unbundled loops than they charge end users.

Significantly, the petition also asks the FCC to adopt non-binding guidelines for State commission approved pricing of unbundled loops in relation to the pricing of local exchange service, in order to discourage price squeezes and to promote effective competition.

Clearly, this express attempt to require local unbundling and, in addition, set "nonbinding" guidelines for pricing of local services, has an important impact on the ability of NARUC's membership to fulfill their respective responsibilities to serve the public interest.

It is also clear that this petition, raises complex public policy and legal considerations that require significant research and analysis. In addition to the required analysis, NARUC is required to coordinate its efforts among its membership to seek consensus upon an appropriate response. Because of the importance of the issues presented by the notice, NARUC posted the text of the petition to its BBS, mailed copies of the petition to its membership, and continues to seek input on proposed comments. NARUC also requested a relatively short extension of time to provide a more focused expression from its membership on this petition. NARUC's extension request was denied. Accordingly, assuming the FCC does not act precipitously, NARUC may well provide additional input on the MFS petition following its summer meetings slated for the end of July.

III. OPPOSITION

As noted earlier, MFS asks the FCC to require LECs to unbundle the local loop, adopt uniform technical standards for interconnection to the unbundled loop facilities, and set "nonbinding guidelines" for pricing of unbundled local loop facilities. MFS Petition at i-iv, 1, 27-33.

As this petition was filed after NARUC's last scheduled meeting, NARUC did not have an opportunity to address the issue of whether it is lawful, or wise from a policy perspective, for the FCC to adopt "nonbinding" pricing guidelines, or take other action, to assist those State commissions that have unbundled the local loop. In the spirit of working out a productive collaborative dialogue on the MFS petition, NARUC will address the issue of developing in conjunction with the FCC, a national non-binding unbundling framework, during the above-referenced scheduled summer meeting.

Nonetheless, its clear that the FCC lacks authority to require local unbundling or mandate uniform technical standards, or pricing guidelines, for such unbundling.

THE FCC DOES NOT HAVE THE JURISDICTION NECESSARY TO GRANT MFS' REQUEST TO UNBUNDLE THE LOCAL LOOP.

The MFS petition stresses the preemptive power of the FCC and would have the FCC take on responsibilities regarding local service, and related revenue requirements, that have always been the exclusive province of NARUC's State commission members.

Even the artfully crafted language of the MFS petition cannot obscure the intrastate focus of the MFS petition. The explicit basis for MFS's petition is the desire to promote local exchange competition. According to MFS, "development of competition will mean that business and residential customers finally will have a choice of local service providers." MFS Petition at 16. Indeed, MFS suggests the FCC "promptly institute a rulemaking to address the overarching technical and pricing issues necessary to facilitate the entry of competitive local service providers. The federal standards will complement state initiates undertaken to promote the development of competition in the local exchange market." Id. at 29. MFS also notes that the Department of Justice has agreed that such unbundling is absolutely necessary "to provide competitive opportunities in the local exchange market." Id. Even more telling, MFS want the FCC to exercise this authority only in States that have already authorized local competition.

But, whatever the merits of MFS's request to "enhance" local competitive offerings, Section 152(b) of the Communications Act of 1934 specifically reserves to the States, the authority over services charges, facilities, and practices "for or in connection with intrastate communications services."[1]

MFS's discussion of the FCC's authority to cross this § 152(b) bar is limited to five pages. MFS Petition at 28-32. MFS begins by suggesting the posed FCC foray into intrastate matters to foster local exchange competition can be justified by the general language of § 151, 47 U.S.C. § 151, which charges the FCC with the responsibility of making available an efficient nationwide communications service with adequate facilities at reasonable prices. In so doing, they ignore the Supreme Court's teachings in Louisiana. In Louisiana, the FCC argued that, Section 220, 47 U.S.C. § 220, which deals with depreciation, "operates automatically to preempt inconsistent State action." More relevant to this proceeding, the FCC also argued, based on § 151, that "federal displacement of State regulation is justifiable under the Act when necessary 'to avoid frustration of validly adopted federal policies'." Id. 476 U.S. at 362.

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[1] 47 U.S.C. § 152(b)(1990); Louisiana Public Service Commission v. FCC, 476 U.S. 355, 373-4 (1986). Specifically, § 152(b) states: "[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier.."

In describing the boundaries of § 152(b), the court rejected both arguments, even in the face of evidence that, in so doing, they would be threatening "..the financial ability of the industry to achieve the technological progress and provide the quality of service that the Act was passed to promote." Id. 476 U.S. at 358. Indeed, the Supreme Court characterized Section 152(b) as "...not only impos[ing] jurisdictional limits on the power of [the FCC], but also...provid[ing] its own rule of statutory construction." (Emphasis Added) *Louisiana*, 476 U.S. 355, 373, 376 n. 5 (1986).

Thus, the opinion makes clear that the FCC can not legitimately preempt State action which frustrates federal policy under § 151 to develop an "efficient, nationwide communications network," even if such action supposedly "jeopardize[s] the continuing viability of the telecommunications industry." Id. 476 U.S. at 368 & 370.

Interestingly, to support its preemptive requests, MFS also cites numerous State proceedings, which, of course, are targeted solely at intrastate local services. This highlights another defect in the MFS petition.

Even if one ignores the glaring jurisdictional deficiencies, the petition does not make an adequate, much less convincing, statement supporting the need for federal intervention.

Indeed, it suggests just the opposite. According to MFS, the cited State proceedings support its public interest arguments as they found that unbundling of the local loop is critical to the development of local exchange competition. Id. at 12 -14.

Thus, MFS concedes that the cited States, which are clearly acting within the bounds of their lawful jurisdiction, are already moving to provide much, if not all, of the relief it seeks here. As MFS has only asked the FCC to take action affecting States that have authorized local competition, that are, by its own admission, addressing these issues, it is far from clear that there is any need for federal action. In fact, the incentives in the MFS petition to spur competition are perverse; only those states that have moved forward on a competitive framework would be preempted.

A related, but more critical lapse of the MFS petition is its failure to even allege, much less demonstrate, that varying State decisions on loop unbundling somehow burden MFS's [or any other competitive access provider's] provision of interstate services. Such a showing is arguably required under the limited case law proffered by MFS in its petition. See, generally, MFS Petition at 31, citing North Carolina Utility Commission v. FCC, 537 F.2d 787 (4th Circuit 1976), cert. den., 429 U.S. 1027 (1976)., Puerto Rico Telephone Company v. FCC, 553 F. 2d 694 (1st Cir. 1977); Public Utility Commission of Texas v. FCC, 886 F.2d 1325 (D.C.Cir 1989)

Moreover, the MFS suggestion - that Section 151, in conjunction with the alleged "inseverability" of local plant used to complete inter- and interstate calls, allows the FCC to preempt the most basic core of State regulatory authority - is an impossible stretch of the rationale presented in those cases.

Such an approach basically writes Section 152(b) out of the Communications Act and elevates the FCC to a court of review of all State regulation of intrastate service.

The States are taking the lead in implementing pro-competitive policies; these policies require a careful balancing of the interests of the incumbent, new entrants, and ratepayers. A collaborative and productive dialogue between the States and the FCC in developing a pro-competitive non-binding framework could assist in the development of local exchange competition, if carefully considered. Stark preemption, as advanced in this petition, will only result in counter-productive debate and gridlock, and impede the development of a competitive market.

IV. CONCLUSION

For the foregoing reasons, NARUC files this opposition to MFS's request, and requests that the FCC reject MFS's requests for proceedings to mandate local loop unbundling and interconnection standards and enter a dialogue with NARUC on the most effective way to shape a Federal/State pro-competitive initiative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JAMES BRADFORD RAMSAY, certify that a copy of the foregoing was served on all parties on the attached Service List.

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April 10, 1995

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